PUBLIC PROSECUTOR v. HUNTSMAN

[A.Cr.J. (MacIntyre J.) November 18, 1965]

[Ipoh — Criminal Appeal No. 56 of 1965]

Income Tax — Power of Comptroller to ask for production of account books — Account books required for reviewing the evidence for appeal — Income Tax Ordinance, 1947, ss. 3, 61B & 93A.

Interpretation of taxing statute — Effect of headings in Act.

The respondent was a member of a legal firm which had been retained by a taxpayer for the purposes of an appeal to the Board of Review. The Assistant Comptroller of Income Tax purported to act under section 61B of the Income Tax Ordinance and asked for the production of the account books of the taxpayer, which were then with the solicitors. The defendant refused to hand them over and he was charged for hindering an officer of the department of Income Tax in the discharge of his duty. The Assistant Comptroller in his evidence said that he required the books for the purpose of reviewing the evidence in connection with the appeal. It appeared that the books were required for the purpose of inspection by counsel and other experts appointed by the comptroller to assist him at the hearing of the appeal. The learned magistrate acquitted the defendant on the ground that no notice had been served on the defendant and also on the ground that the exercise of power by the comptroller under section 61B of the Income Tax Ordinance was repugnant to the provisions of the Ordinance and not in accordance with the fundamental rules of judicial procedure. The Public Prosecutor appealed.

Held: (1) the service of a notice is not mandatory for the exercise of the power under section 61B of the Income Tax Ordinance and therefore the learned magistrate was wrong in holding that the service of a notice was a prerequisite for a prosecution under section 93A of the Ordinance;

(2) there is no specific provision in the Income Tax Ordinance which would entitle the comptroller to take possession of the account books of a taxpayer to prepare his brief in connection with an appeal and to interpret the provisions of the Ordinance as implying that a respondent in an appeal could exercise administrative control over the appellant in any form in regard to the conduct of the appeal would be repugnant to the rules of judicial procedure and the concept of equality before the law.

Cases referred to:—

(1) *Rex* v. *Surrey (North Eastern Area) Assessment Committee* [1948] 1 K.B. 28.

(2) *Mordue* v. *Palmer* L.R.6 Ch.App. 22, 31.

(3) *Re V. G. M. Holden Ltd.* [1941] 3 All E.R. 417.

CRIMINAL APPEAL.

Au Ah Wah (Senior Federal Counsel) for the appellant.

N. T. Rajah for the respondent.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal by the Public Prosecutor against the decision of the learned magistrate at Ipoh whereby the respondent was acquitted and discharged at the end of the case for the prosecution of an offence under section 93A and punishable under section 90 of the Income Tax Ordinance No. 48 of 1947.

The respondent who is an advocate and solicitor and the senior partner of the legal firm of Messrs. Maxwell, Kenion, Cowdy & Jones of Ipoh, was charged as follows:

"That you on the 9th day of December, 1964, at the office of Messrs. Maxwell, Kenion, Cowdy & Jones, Mercantile bank building Ipoh, hindered an officer of the Department of Income Tax in the discharge of his duty and thereby committed an offence under section 93A of the Income Tax Ordinance 1947 and punishable under section 90 of the Ordinance."

The respondent is also the chairman of the board of directors of a group of rubber estates known as Buloh Akar Estates (1955) Ltd. One of the estates belonging to this group, namely the Sungei Riam Estate is leased to Kantang Perak Mines Ltd. In assessing the income of Buloh Akar Estates Ltd. for the year 1962-63 it would appear that the Comptroller of Income Tax issued notices of two additional assessments on the basis of the accounts kept by Kantang Mines Ltd. in respect of Sungei Riam Estate. On receipt of these notices Buloh Akar Estates Ltd. applied to the comptroller to review and revise the assessments under section 72(2) of the Income Tax Ordinance. The Comptroller had, thereupon, acting under sub-section (3) thereof overruled the objection after due enquiry, in the course of which Sungei Riam Estate was inspected and the account books examined by Mr. Philip, the Assistant Comptroller, and Mr. Nair, the Rubber Research Adviser to the Comptroller. From that decision of the Comptroller, Buloh Akar Estates Ltd. lodged an appeal to the Board of Review on the 11th of June 1964 under section 75 of the Ordinance. The hearing of the appeal is still pending before the Board.

The Comptroller then retained Messrs. Shearn, Delamore & Co., a firm of solicitors, to handle the appeal on his behalf and secured the services of a planting expert by the name of Mr. Graham to assist him in the appeal. Obviously, neither counsel nor the planting expert could have been of much assistance to the Comptroller without first inspecting the estate and the relevant account books. Therefore, by a letter dated the 6th of November 1964 and addressed to the secretaries of Buloh Akar Estates Ltd., Messrs. Shearn, Delamore & Co. asked permission for Mr. Graham to visit and inspect the estate. It would appear from the evidence that this request was refused. Then on the 28th of November the respondent in his capacity as the chairman of the board of directors of Buloh Akar Estates Ltd. was interviewed in his office at Maxwell, Kenion, Cowdy & Jones, by Mr. Philip and asked to hand over the account books of Sungei Riam Estate for the year 1962-63. The respondent it would appear asked for time to call a meeting of the board of directors to consider the request and Mr. Philip acquiesced and went away.

Then on the 1st of December, Mr. Philip accompanied by one Mr. Lee Beng Fye (P.W.2), called at the office of Messrs. Evatt & Co., the secretaries and accountants of Buloh Akar Estates Ltd. and presented to Mr. Woon Kim Teck (P.W.3), the chief clerk, a letter bearing the same date and signed by Mr. Philip himelf as assistant comptroller. A copy of that letter was produced and admitted in evidence as P.4. It contained a demand for certain records and accounts books of Sungei Riam Estate specified therein and to quote the relevant passage, "for the purpose of inspecting and making extracts from them, because appeals have been lodged against additional assessments upon the above-named company and the Comptroller considers it necessary in the execution of his duties under the Income Tax Ordinance to reconsider the evidence." The words "abovenamed company" referred to Buloh Akar Estates (1955) Ltd. The chief clerk, according to Mr. Philip, acting on the instructions of the company refused to hand over the books but according to the evidence of the chief clerk the books were not handed over because he had no authority to do so. Mr. Philip thereupon obtained a search warrant from the sessions court and revisited the premises but on this occasion he was told by the chief clerk that the books were no more upon the premises. This fact was officially confirmed by Messrs. Evatt & Co. by their letter (D.3) dated the 3rd of December. According to the letter the books of Kantang Perak Mines Ltd. in respect of Sungei Riam Estate for the years 1962, 1963 and 1964 had been sent to Messrs. Maxwell, Kenion, Cowdy & Jones, the solicitors for Buloh Akar Estates Ltd. on the instructions of the directors of Kantang Perak Mines Ltd. in connection with the income tax appeal by Buloh Akar Estates (1955) Ltd. The letter also confirmed that at the time of Mr. Philip's visit to their office the main books and records had already been handed over to Messrs. Maxwell, Kenion, Cowdy & Jones.

This letter prompted another call on the respondent at his office in Messrs. Maxwell, Kenion, Cowdy & Jones by Mr. Philip on the 4th of December. On this occasion the respondent was said to have refused to hand over the books without first consulting his legal partners but intimated his willingness to answer any question in regard to the accounts. Later Mr. Philip was informed by telephone that the other partners objected to the handing over of the books to him but were willing to consider sympathetically any questions regarding the accounts.

Finally, on the 9th of December Mr. Philip called on the respondent at his office and shewed him a letter of authority signed by himself as Comptroller of Inland Revenue authorising himself to exercise his powers under section 61B of the Income Tax Ordinance and once more demanded the account books to be handed over to him. Mr. Philip deposed that on this occasion he had told the respondent that the Comptroller wanted to reconsider the evidence himself and also wanted the books to be seen by his counsel, and a group of persons including Mr. Graham who were working on the case. The respondent, though willing to answer questions, refused to hand over the books, resulting in the proceedings which is the subject-matter of this appeal.

The duties of the Comptroller are defined by section 5(4) of the Income Tax Ordinance which reads as follows:

> 5. (4) The Comptroller shall be responsible for the assessment of tax and collection of tax penalties in the States of Malaya and, subject to the provisions of section 100, shall pay all amounts so collected into the Consolidated Fund."

Section 61B(1) of the Ordinance under which the Comptroller purported to act when he asked the respondent to hand over the books reads as follows:

> "61B. (1) Where the Comptroller considers it necessary in the execution of his duties under this Ordinance, the Comptroller shall at all times have full and free access to all lands, buildings and places, and all books and documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatsoever, for the purpose of ascertaining any facts or inspecting any books and documents, which the Comptroller considers necessary or relevant for the purposes of this Ordinance, or considers likely to provide any information otherwise required for the purposes of this Ordinance, and may, without fee or reward, make extracts from or copies of any such books or documents."

The learned trial magistrate held that since section 61B fell within Part X of the Ordinance headed "Returns" the power of the comptroller to ask for the production of account books was limited to the purpose of verifying the returns of income furnished under this Part. He arrived at this conclusion, according to him, after satisfying himself that there was "considerable authority for the proposition that 'Headings' in a Statute may be looked at for the purpose of resolving any ambiguity, though not for the purpose of qualifying words which are clear and unambiguous."

The first ground of appeal is therefore that the learned magistrate erred in law in holding that the Comptroller's exercise of his powers under section 61B at the respondent's office was "*ultra vires*, null and void". The law on this point was neatly summed up by Lord Goddard C.J. in *Rex* v. *Surrey (North Eastern Area) Assessment Committee* [1] in the following words:

> "But whiile the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in the section where there cannot be any doubt as to their ordinary meaning."

Now the clear words of section 61B are that the Comptroller could avail himself of his powers

thereunder in the execution of his duties under the Ordinance. If the legislature had meant to limit the powers of the Comptroller to his duties under Part X then the section would have said so. Besides, the power of the Comptroller to call for and examine books of account for the purpose of verifying returns is already provided for by section 61 of the Ordinance and it would be repugnant to the rules of construction to presume that the powers given in one section are co-extensive with the powers given in another section.

Another ground of appeal is that the learned magistrate erred in law in holding that the service of a notice under section 90(1) of the Ordinance is a prerequisite for an offence under section 93A of the Ordinance. In his ground of judgment the learned magistrate says and I quote:

"The next question to be determined is the validity of the prosecution of Mr. Huntsman, under section 93A of the Ordinance. Section 90(1) of the Ordinance states that no person shall be liable for prosecution for failing to comply with the terms of any notice issued unless such notice shall be served on him personally or by registered post.

There is not an iota of evidence to indicate that such a notice was served on Mr. Huntsman on the 9th of December, or sent by registered post.

However, there is evidence to indicate that Mr. Philip served a notice under section 61B as amended by sub-section (1A) in the Income Tax Act 1963 on Buloh Akar Estates Ltd. by delivering the notice in person to Messrs. Evatt & Co.".

To take the last paragraph of the above extract first, it is not correct to say that the letter written by Mr. Philip to Evatt & Co. was a notice under section 61B as amended by sub-section (1A). No provision is made in the section for the comptroller to serve a notice on the person required to produce or hand over the books. Again, there is no mention of a notice in section 90(1) of the Ordinance. What perhaps the learned magistrate had in mind was the proviso to section 90(2) of the Ordinance. Section 90(2) states that any person guilty of an offence for which no penalty is provided shall be liable on conviction, to a fine not exceeding one thousand dollars and in default to imprisonment for a term not exceeding six months provided that, to quote the proviso, "no person shall be liable to prosecution for an offence against this Ordinance in respect of a failure to comply with the terms of any notice issued under the provisions of the Ordinance or any Rules made thereunder unless such notice shall have been served on him personally or by registered post". It simply means that where a person had been served with a notice as provided under any of the provisions of the Ordinance, then in a prosecution for non-compliance with the notice it is incumbent upon the prosecution to prove that the notice had been served personally on the offender or by registered post. Since the service of a notice is not mandatory for the exercise of the power under section 61B, the learned magistrate erred in law in holding that the service of a notice was a prerequisite for a prosecution under section 93A.

The learned magistrate also held that the exercise of power by the comptroller under section 61B was repugnant to the provisions of the Income Tax Ordinance and not in accordance with the fundamental rules of judicial procedure.

In this connection, Mr. Rajah for the respondent argued that the comptroller having exercised his duty under section 72 of the Ordinance and rejected the objection lodged by the Buloh Akar Estates Ltd. had no further duty to perform under the Ordinance in respect of the assessments under appeal. Mr. Au Ah Wah for the Comptroller on the other hand contended that the duties of the Comptroller in respect of assessment did not abate by reason of an appeal to the Board of Review and that the Comptroller was entitled to exercise his powers under section 61B for the purpose of making additional assessments under section 69 of the Ordinance by virtue of the proviso to section 80 which reads:

"Provided that nothing in this section shall prevent the Comptroller from making any assessment or additional assessment under section 69 of this Ordinance which does not involve reopening of any matter which has been determined on appeal."

Section 69 of the Ordinance reads:

"69. (1) Where it appears to the Comptroller that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged the Comptroller may, within the year of assessment or within twelve years after the expiration thereof, assess such person at such amount or additional amount as according to his judgment ought to have been charged:

Provided that where it appears to the Comptroller that any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax, the Comptroller may, for the purpose of making good any loss of tax attributable to fraud or wilful default, assess such person at any time.

(2) The provisions of this Ordinance as to notice of assessment, appeal and other proceedings under this Ordinance shall apply to any assessment or additional assessment made under the provisions of sub-section (1) of this section and to tax charged thereunder."

There is not an iota of evidence to justify the view that the respondent was asked to hand over the books to the comptroller for the purpose of action under section 69 of the Ordinance. The reasons for wanting the books were given in evidence by Mr. Philip himself and the main purpose for which they were required was for reviewing the evidence in connection with the appeal. It is not clear what he meant by "reviewing the evidence". The comptroller had already performed the duty of reviewing the evidence when after the enquiry he had rejected

the objection to the assessments. What then could have been the purpose of the comptroller in wanting to review the evidence? He could not have, as a result of the review, either enhanced or reduced the assessments. Having executed his judicial functions under the Ordinance he is *functus officio* and the observations of Mellish L.J. in *Mordue* v. *Palmer* [2] in respect of the powers of an arbitrtrator would apply to the facts of this case. The learned judge said:

"I think the result of cases at law is that when an arbitrator has signed a document as and for his award, he is *functus officio*, and he cannot of his own authority remedy any mistake."

Again in *V. G. M. Holden Ltd.*,[3] the headnote reads:

"When a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has a jurisdiction to vary the terms of such stay. The only way of obtaining any variation is to appeal to a higher tribunal."

The Income Tax Ordinance being a taxing Ordinance, the provisions have to be strictly construed to ascertain the duties and powers of the Comptroller. In this connection it would be relevant to quote the following passage from *Halsbury* Laws of England (Third Edition) Vol. 36 at pages 416 and 417:

"The language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment, and regard must be had to the clear meaning of the words. If the Crown claims a duty under a statute, it must show that that duty is imposed by clear and unambiguous words and where the meaning of the statute is in doubt, it must be construed in favour of the subject, however much within the spirit of the law the case might otherwise appear to be; but a fair and reasonable construction must be given to the language used without leaning to one side or the other."

However, in the course of his evidence, Mr. Philip gave another reason for wanting the account books, and that was for the purpose of inspection by counsel and other experts appointed by the Comptroller to assist him at the hearing of the appeal. This appears to be the real reason why the books were wanted and has been so found by the learned magistrate. I have no reason to disagree with that finding. When Mr. Philip asked the respondent for the books on the 9th of December it was his intention to retain possession of them for ten days but the learned magistrate held that his motive was to seize the evidence for use by his counsel and others at the hearing of the appeal. This is rather an extreme view which is unsupported by the evidence and counsel for the Public Prosecutor took exception to some of the remarks made by the learned magistrate in the course of his judgment — remarks which might be taken to imply that the Comptroller had acted in a manner prejudicial to the liberty of the subject and so forth. I have perused the evidence with great care and I have no doubt that throughout this unhappy episode Mr. Philip conducted himself with restraint and patience and that he honestly believed that his action was covered by the provisions of section 61B of the Income Tax Ordinance.

Now to revert to the main ground of appeal; counsel for the Public Prosecutor submitted that since an appeal against an assessment did not operate as a stay of execution the Comptroller was entitled to ask for the production of the account books at any time for the purpose of instituting legal proceedings for the recovery of the tax. I cannot accept this argument since in the first place no evidence was led to show that the books were required for that purpose and in the second place a suit for the recovery of income tax is not based on the account books but on the notice of assessment.

There is no specific provision in the Ordinance which would entitle the Comptroller to take possession of the account books of a tax-payer to prepare his brief in connection with an appeal. However, it was argued before me that the act of resisting the appeal was a step in the process of collecting the tax which is one of the main duties of the Comptroller under the Ordinance. The Income Tax Ordinance being a taxing Ordinance, its provisions have to be construed strictly and in case of doubt in favour of the tax-payer. Section 82 of the Ordinance lays down the law that the tax for any year of assessment levied in accordance with the provisions of sections 38 and 39 of the Ordinance shall be payable at the place stated in the notice given under section 72 within a month after the service of the notice, notwithstanding any objection or appeal against the assessment. In other words, an appeal does not operate as a stay of execution. In the circumstances it would not be correct to say that to resist an appeal is a step in the collection of tax.

In an appeal before the Board of Review, the status of the Comptroller in respect of the subject-matter of the appeal is nothing more than that of an ordinary respondent in the appeal. As a respondent he is entitled to have access to the books for the purpose of instructing counsel although he could have made the necessary extracts at the time when he rejected the objection and the assessee refused to accept his finding. In my opinion the account books constituted the main evidence in the case on which the Comptroller had based the assessments. They cannot therefore be regarded as confidential documents or of containing confidential communications within the meaning of section 126 of the Evidence Ordinance which would have entitled the respondent as solicitor briefed in the appeal to withhold their production. When the respondent refused to hand over the books there

was a remedy open to the Comptroller. He could have applied to the Board of Review for an order for production of accounts for inspection. Be that as it may, to interpret the provisions of the Income Tax Ordinance as implying that a respondent in an appeal could exercise administrative control over the appellant in any form in regard to the conduct of the appeal after the Board of Review had become seized of the matter, would in my opinion be repugnant to the rules of judicial procedure and the concept of equality before the law.

The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

ABRAHAM v. CHOO JIT FUNG & ANOR.

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) July 26, 1965]

[Singapore — Federal Court Civil Appeal No. 44 of 1964]

Negligence — Running down — Children crossing road — Degree of caution — Question of contributory negligence.

Damages — Rupture of spleen — Removal of spleen — Fracture of femur — Measure of damages.

The 1st respondent, a school girl aged 7 years 10 months, was knocked down by a car driven by the appellant while she was crossing a road with three other girls on their way to school. As a result of this accident she suffered a fracture of the left femur, a rupture of the spleen and underwent an operation to remove the spleen. According to the medical report "the removal of the spleen might be of quite serious consequences were the person to suffer from malaria or other blood dyscrasia". It was contended for the appellant that (i) there was no evidence or no sufficient evidence of negligence on the part of the appellant, and (ii) the child was guilty of contributory negligence.

Held: (1) this was an absolutely clear case of negligence on the part of a driver of a motor vehicle by reason of failure to keep a proper look-out;

(2) a child of the respondent's age in the circumstances of this collision (there was nothing irregular or unsatisfactory in the manner in which she crossed the road) should not be held in any degree or in any way to blame for the accident;

(3) damages at $6,000 to cover a fracture of the left femur and loss of a spleen was a proper sum to award.

FEDERAL COURT.

K. E. Hilborne for the appellant.

H. E. Cashin for the respondents.

Wee Chong Jin C.J. (Singapore) (delivering oral judgment): This appeal arises out of yet another running down action in which a young girl, at the time of the accident aged 7 years and 10 months, one morning while on her way to school with three other girls the eldest of whom was 12 years old was knocked down by a car driven by the defendant.

The evidence of the girl was that while crossing from the Dunearn side of Bukit Timah Road over to the other side she was run down by the defendant's car. According to her immediately before she started to cross the road she looked to the left and saw a car far away and then proceeded to cross the road slightly in front of the three other companions. About half way across the road she looked to the left again and saw the car, according to her still some distance away, and she continued on but almost immediately thereafter she was run into.

The defendant's evidence which emerged in cross-examination disclosed that he did not notice this group of four girls at any stage while they were on the road until he was almost on them and they were in the path of his moving vehicle and he has estimated his speed to be then about 25 to 30 miles per hour. He quite frankly said that he was unable to say whether they ran or walked as they crossed the road as he did not see them till they were in his path. The evidence of the girl as to the way they crossed the road was that they walked.

The learned trial judge on all that evidence came to the conclusion that the defendant had failed to keep a proper look-out as had he done so he would have seen the children when they were on the road. Now it seems to me on the facts that I have just related an absolutely clear case of negligence on the part of a driver of a motor vehicle by reason of failure to keep a proper look-out and there is no substance whatsoever in the argument put forward before us that there was no evidence or no sufficient evidence of negligence on the part of the defendant. In my view the contrary was the case. There was overwhelming evidence that this appellant was negligent in that he failed to keep a proper look-out.

The other ground of appeal is that assuming the appellant to be negligent, the plaintiff had contributed to the accident, in other words was guilty of contributory negligence in that she crossed the road when it was unsafe to do so knowing that there was an oncoming vehicle.

Now the trial judge on this aspect of the matter found that there was nothing irregular or unsatisfactory in the manner the first plaintiff crossed this road. He said "She acted as a normal child of her age would have done under the circumstances. Children are children and they could not be expected to act with the same degree of caution as an adult person. Their judgment of things cannot be as high as that of an adult individual. Could the 1st plaintiff under the circumstances be said to have acted unreasonably? In my opinion she has clearly not done so."

I accept the conclusion arrived at by the trial judge and his view that a child of her age